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No. 93-1285

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Supreme Court of the United States

October Term, 1993

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMMISSIONER THOMAS C. JORLING, and DEPUTY COMMISSIONER AND GENERAL COUNSEL MARC S. GERSTMAN,

Petitioners,

against

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Reply Brief in Support of Petition for a Writ of Certiorari

The Court should grant the petition because of conflicts between state high courts involving an important issue.

The decision issued by the New York State Court of Appeals squarely conflicts with the decision issued by the

Washington Supreme Court in *P.U.D. No. 1 of Jefferson County and City of Tacoma v. State of Washington, Department of Ecology, Department of Fisheries, and Department of Wildlife*, 849 P. 2d 646 (Wash. 1993), *cert. granted*, 62 U.S.L.W. 3206 (Oct. 4, 1993), No. 92-1911, argued before this Court February 23, 1994. The Washington court held that a State could consider a State statute when evaluating an application for a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, and the New York court held that a State could not consider a State statute when making that evaluation. This Court should grant the petition in order to resolve the conflict or, at a minimum, refrain from ruling on the petition in this case pending issuance of this Court's decision in the Washington case.

Contrary to the assertions in respondent's brief (Br. in Opp., pp. 8-11), the Washington court's holding that water quality certifications "may include conditions to enforce all water quality-related *statutes and rules*, including but not limited to, state water quality standards" (849 P. 2d at 651, emphasis added) is not mere *dicta* but is central to that court's decision. In the case decided by the Washington court, the issue was whether the conditions imposed in the State's water quality certification were within the scope of the State's authority under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. The conditions were imposed in reliance on a State statute which mandated retention of base flows in the river in order to protect the water's uses and values for fish and wildlife, recreational purposes and its use for navigation. The Washington statute was not part of Washington's EPA-approved water quality standards. 849 P.2d at 653. In the case decided by the New York court, the issue was whether the State could consider water quality-

protective State statutes, not part of New York's EPA-approved water quality standards, when evaluating an application for a water quality certification. The legal questions involved in both cases are the same and the rulings directly conflict with each other.

The Washington court's additional holding that the Washington statute qualified as an "appropriate requirement of State law" under Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d), also directly conflicts with the New York court's holding that that section does not authorize States to consider State statutes when evaluating an application for a water quality certification. The New York court expressly stated that the Washington court had adopted a broader view of 33 U.S.C. § 1341(d) (Pet., 10a-11a) and declined to agree. Simply put, two state high courts have issued conflicting rulings interpreting the scope of State authority conferred by the same federal statute, and resolution of the conflict by this Court is appropriate.

Respondent's assertion (Br. in Opp., p. 8, fn. 10) that the issue of the scope of State authority under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, does not present an important question under Rule 10.1(c), is belied by the interest shown by industry, the regulators, and the environmental legal community in this issue at the Supreme Court. In the Washington case, which reached this Court earlier than did this case, industry submitted six *amicus* briefs in opposition to the State of Washington's position. One was from Niagara Mohawk Power Corporation, the respondent here, as acknowledged at footnote 12 (Br. in Opp., pp. 10-11). Briefs in support of Washington's position were submitted by 44 states, including New York, and *amicus* briefs in support of Washington were also submitted by 18

environmental groups and the United States. These cases are important because hundreds of relicensing proceedings will occur in the next decade as existing 50 year Federal Power Commission (now the Federal Energy Regulatory Commission) licenses for hydroelectric projects expire.

Conclusion

This Court should grant the petition or, at a minimum, withhold ruling on the petition pending issuance of this Court's decision in the Washington case.

Respectfully submitted,

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